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Decision

Matter of: WRG Fire Training Simulation Systems, Inc.

File: B-419480.3; B-419480.4; B-419480.5

Date: November 19, 2021

Mark G. Jackson, Esq., Jackson Holcomb LLP, for the protester.
John M. Manfredonia, Esq., and Sarah C. Reida, Esq., Manfredonia Law Offices, LLC, for Maritime Institute of Technology and Graduate Studies, the intervenor.
D. Thomas Wilson, Esq., and Patrick D. Healy, Esq., Department of the Navy, for the agency.
Heather Self, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that awardee failed to satisfy material solicitation requirement for restrooms in a permanent structure is sustained where agency failed to establish the reasonableness of its evaluation conclusion that the awardee offered a permanent structure as required by the solicitation.

DECISION

WRG Fire Training Simulation Systems, Inc., a service-disabled veteran-owned small business of Newberg, Oregon, protests the award of a contract to the Maritime Institute of Technology and Graduate Studies (MITAGS), of Linthicum Heights, Maryland, under request for proposals (RFP) No. N61340-20-R-0016, issued by the Department of the Navy, Naval Air Systems Command, Naval Air Warfare Center Training Systems Division, for live-fire and damage control trainings. The protester contends that the agency should have evaluated the awardee as technically unacceptable.

We sustain the protest.

BACKGROUND

Through the procurement at issue here, the agency sought a contractor-owned “turnkey facility” at which the contractor will provide instructors and other personnel to administer agency-prescribed live-fire firefighting and damage control training courses to Navy and U.S. Coastguard personnel stationed in the Pacific Northwest Fleet Concentration Area in the Seattle, Washington vicinity. Contracting Officer’s Statement and Memorandum

of Law (COS/MOL) at 4; Agency Report (AR), Tab 7, Performance Work Statement (PWS) at 213.¹ The protester is the current, incumbent provider of these training services. AR, Tab 6, RFP amend. 5, Final RFP at 194.

On July 23, 2020, under the procedures of Federal Acquisition Regulation part 15, the agency issued a solicitation for a follow-on contract for these firefighting and damage control training services. AR, Tab 6, RFP amend. 5, Final RFP at 152, 170; Tab 8, Price Evaluation Report (Price Eval. Rpt.) at 236. The solicitation contemplated award of a single fixed-price contract with a 1-year base period and four 1-year option periods to the offeror submitting the lowest-priced, technically acceptable (LPTA) proposal. AR, Tab 6, RFP amend. 5, Final RFP at 153, 174-176, 196.

The solicitation established two evaluation factors--technical and price. *Id.* at 196. The technical evaluation consisted solely of a pre-award facility inspection using a technical requirements checklist set forth in section M, C.2 of the solicitation.² *Id.* at 196, 198-201. The solicitation established that a proposal would be assigned a technical rating of acceptable if it “[met] the requirements contained in Section M, C.2, Technical Requirements Checklist,” and would be assigned a technical rating of unacceptable if it “[did] not meet one or more of the requirements contained in Section M, C.2, Technical Requirements Checklist, and therefore is not eligible for award.” *Id.* at 198. With respect to price, the solicitation established that the agency would evaluate proposed pricing for reasonableness and balance. *Id.* at 194.

The agency received two proposals, one from WRG and one from MITAGS. AR, Tab 8, Price Eval. Rpt. at 236. After an initial evaluation, the agency selected WRG’s proposal for award. *Id.* MITAGS protested the agency’s evaluation and award decision, and in response the agency notified our Office of its intent to take corrective action resulting in our dismissal of the protest as academic. *Maritime Institute of Tech. and Graduate Studies*, B-419480, Jan. 22, 2021 (unpublished decision). MITAGS subsequently protested the scope of the agency’s proposed corrective action, in response to which the agency submitted a clarification of its corrective action. COS/MOL at 5 n.1. The agency’s clarification resulted in our Office dismissing MITAGS’s second protest as

¹ In its report responding to the protest, the agency submitted its COS/MOL and tabs 1-8, 11, and 13-21 as a consolidated Adobe PDF-type document with consecutive pagination; we utilize the consecutive PDF page numbers in our citations to these documents. The agency also submitted tabs 9, 10, and 12 of its report as separate Microsoft Excel-type files, and our citations to these tabs refer to each documents’ internal row and column structuring.

² The solicitation did not provide for an evaluation of the training courses to be administered by the contractor, as the content of those courses was prescribed by the agency and would be provided as government furnished information. PWS at 215. Additionally, the solicitation provided that the agency would assess the qualifications of personnel the contractor proposed to administer the courses after award. *Id.* at 218.

academic. *Maritime Institute of Tech. and Graduate Studies*, B-419480.2, Mar. 10, 2021 (unpublished decision).

As part of its corrective action, the agency reevaluated proposals, resulting in both WRG's and MITAGS's proposals being found technically unacceptable, and the agency opening discussions with both offerors. AR, Tab 11, Competitive Range Determination at 246. Discussions consisted of the agency re-inspecting the offerors' facilities to assess whether the technical requirements checklist items previously found technically unacceptable had been remediated to a technically acceptable level. COS/MOL at 14. Following discussions (re-inspection), the agency evaluated both proposals as technically acceptable. AR, Tab 13, Unsuccessful Offeror Notice at 249. WRG proposed a price of \$11,160,125, while MITAGS proposed a price of \$10,979,152. *Id.* On August 25, in accordance with the solicitation's LPTA award methodology, the agency selected MITAGS's lower-priced proposal for award. *Id.* Following notification of award, WRG filed this protest with our Office, and MITAGS intervened.

DISCUSSION

WRG submitted an initial protest and two supplemental protests in this matter. In its initial protest, WRG argued that MITAGS's facility is not in compliance with various Occupational Safety and Health Administration regulations, environmental safety standards, and other safety requirements. Protest at 1-2. In its first supplemental protest, WRG contended that the agency should have evaluated MITAGS's facility as technically unacceptable because it failed to satisfy five of the technical requirements checklist items. Supp. Protest at 3-5. In its comments on the agency's report responding to the protests, WRG withdrew its initial and first supplemental protests in their entireties. Comments at 1. Accordingly, we do not discuss further the withdrawn arguments, and focus below on WRG's remaining second supplemental protest, in which WRG argues that the agency should have evaluated MITAGS's facility as technically unacceptable because it failed to satisfy an additional item from the technical requirements checklist. 2nd Supp. Protest at 3-4.

Specifically, WRG contends that MITAGS's facility failed to meet the requirements of item (j) on the requirements checklist. 2nd Supp. Protest at 3-4. Item (j) required an offeror's facility to include "[a] permanent structure with male and female restrooms and changing rooms" in which each lavatory maintained an ambient temperature between 68-76 degrees, provided "hot and cold running water, or tepid running water," and was equipped with "[h]and soap or similar cleaning agents." AR, Tab 6, RFP amend. 5, Final RFP at 199. During the solicitation's question and answer period, MITAGS posed a question about this item's requirement for a permanent structure. Intervenor's Supp. Comments, attach. 1, Decl. of MITAGS's Assistant Director of Business Development (Asst. Dir. of Bus. Dev.) at 1. Specifically, question 17 asked if "a prefabricated locker room and restroom trailers [sic] mounted on concrete piers" would meet the requirement in item (j) for a permanent structure. AR, Tab 6, RFP amend. 5, attach. 7, Questions and Answers (Q&A) at 204. The agency responded that "[a] prefabricated locker room and restroom trailers [sic] mounted on concrete piers qualify [sic] could qualify" if it also

satisfied the remainder of the requirements listed in item (j). AR, Tab 6, RFP amend. 5, attach. 7, Q&A at 204.

On June 30, 2021, during the reevaluation, the agency inspected and photographed MITAGS's proposed facility. AR, Tab 15, Decl. of Safety Specialist at 252; 5-Day Letter at 4.³ With respect to MITAGS's restroom facilities, the agency's photographs show a wheeled trailer with two doors--one labeled "men" and one labeled "women." 2nd Supp. Protest, exh. 5 at Photo 1.⁴ In the photographs, the trailer appears to our Office to be resting on a combination of wood and concrete blocks. *Id.* at Photos 1-3. Both the evaluation checklist filled out during the inspection, and the narrative evaluation report completed after the inspection, provide only that the agency assessed MITAGS's restroom facilities as "acceptable." AR, Tab 9, MITAGS's Initial Technical Requirements Checklist at Row 26, Columns A-C; Tab 16, MITAGS Technical Requirements Inspection, June 30, 2021, at 255.

MITAGS's facility failed the June 30 site inspection with respect to a technical requirements checklist item not at issue here--item (t). AR, Tab 9, MITAGS's Initial Technical Requirements Checklist at Row 36, Columns A-E; *see also* Tab 15, Decl. of Safety Specialist at 252; Tab 16, MITAGS Technical Requirements Inspection, June 30, 2021, at 255. On July 29, the agency conducted a second inspection of MITAGS's facility "to re-inspect only those items previously found unacceptable during the initial inspection." COS/MOL at 14; AR, Tab 15, Decl. of Safety Specialist at 254. Following the July 29 inspection, the agency concluded that "all items on the inspection checklist had been found 'acceptable' for MITAGS' facility." AR, Tab 15, Decl. of Safety Specialist at 254; *see also* Tab 12, MITAGS' Final Technical Requirements Checklist; Tab 17, MITAGS Technical Requirements Inspection, July 29, 2021, at 257.

In reviewing an agency's evaluation of proposals, it is not our role to reevaluate submissions; rather, we examine the supporting record to determine if the agency's evaluation was reasonable, consistent with the terms of the solicitation, and documented adequately. *Public Properties, LLC*, B-419414, B-419414.2, Feb. 9, 2021, 2021 CPD ¶ 78 at 3. While we will not substitute our judgment for that of the agency, we will question the agency's conclusions when they are inconsistent with the solicitation criteria and applicable procurement statutes and regulations, undocumented,

³ The agency submitted the photographs as an embedded link included in its production of documents in response to the protest. See 5-Day Letter at 4. The link was to website address <https://tinyurl.com/yta3s9s6>, which when viewed showed several dozen unlabeled photographs (site last visited Oct. 19, 2021).

⁴ As part of its second supplemental protest, WRG provided downloaded images of the agency-provided unlabeled photographs showing the wheeled trailer at MITAGS's facility. See 2nd Supp. Protest, exh. 5. WRG labeled the downloaded images "Photo 1", "Photo 2," and "Photo 3." For ease of reference, and because the photos provided by the protester appear to be the same as those provided by the agency, we cite to the labeled, rather than the unlabeled, versions of the photographs

or not reasonably based. *Id.*; *Deloitte Consulting, LLP*, B-412125.2, B-412125.3, Apr. 15, 2016, 2016 CPD ¶ 119 at 12. When an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its evaluation conclusions. *Public Properties, LLC, supra* at 3; *Harmonia Holdings Group, LLC*, B-417475.3, B-417475.4, Sept. 23, 2019, 2019 CPD ¶ 333 at 18.

In addition, our Office will not limit its review of an agency's evaluation to contemporaneously documented evidence, but instead will consider all the information provided, including a party's arguments and explanations. *Hoover Properties*, B-418844, B-418844.2, Sept. 28, 2020, 2020 CPD ¶ 372 at 7; *CRAssociates, Inc.*, B-418194, Jan. 23, 2020, 2020 CPD ¶ 80 at 5. Post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, generally will be considered in our review so long as those explanations are credible and consistent with the contemporaneous record. When, however, an agency's post-protest defense of its evaluation is not supported by the contemporaneous record, or is inconsistent with the record, such explanations are unpersuasive and will be afforded little weight. *Hoover Properties, supra* at 7; *Avionic Instruments LLC*, B-418604, B-418604.2, June 30, 2020, 2020 CPD ¶ 225 at 6; *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

The protester argues that, based on the photographs, it is "obvious that [MITAGS's restroom] trailer is not permanent, nor is it intended to be." 2nd Supp. Protest at 3. The protester contends that even taking into account the agency's response to question 17, the restroom trailer at MITAGS's facility failed to satisfy the solicitation requirement for a permanent structure because it was only resting on "temporary wood supports," not "mounted on concrete piers." *Id.* at 3-4. The protester maintains that the agency should have evaluated MITAGS's facility as technically unacceptable because it failed to provide restrooms in a "permanent structure," as required by item (j).

As the awardee-intervenor, MITAGS explains that the photographed restroom trailer was "situated at our facility by lifting it with a forklift and placing it on four concrete piers located along the restroom trailer's axle and center of gravity" (MITAGS does not represent that the trailer was "mounted" to the concrete piers). Intervenor's Supp. Comments, attach. 1, Decl. of MITAGS's Asst. Dir. of Bus. Dev. at 1. MITAGS maintains that the concrete piers are not visible in the agency's inspection photographs "because the tire is blocking their view." *Id.* MITAGS further explains that in addition to the non-visible concrete piers, it placed concrete "blocks with jacks at each corner of the restroom trailer for leveling purposes, but not for load bearing purposes." *Id.* These concrete blocks appear to be visible in the agency's inspection photographs. See 2nd Supp. Protest, exh. 5 at Photos 1-3. MITAGS provides that it also placed "wooden boards" under the trailer's tires "as a safety precaution against a possible tripping hazard" because the tires "were no longer on the ground." Intervenor's Supp. Comments, attach. 1, Decl. of MITAGS's Asst. Dir. of Bus. Dev. at 1. MITAGS maintains that, after its placement on the various piers and blocks, the restroom trailer

“was no longer mobile and could not be moved without removing the concrete piers.”⁵ *Id.*

In its initial report responding to the protest, the agency notes that its response to question 17 “did not require a trailer to be mounted on concrete piers,” but simply “indicated that such a set up [being mounted on concrete piers] would be acceptable” provided it met the other requirements of item (j) (e.g., running water). AR, Tab 19, Decl. of Deputy Chief of the Contracting Office at 260; see also COS/MOL at 30. The agency’s response, however, provides no answer to the protester’s assertion that MITAGS’s restroom trailer was not offered as a permanent structure. Specifically, the answer does not explain how MITAGS’s restroom trailer was situated, and offers no explanation for why the evaluators assessed it as meeting item (j)’s requirement for restrooms to be provided in a “permanent structure.”⁶ Instead, the only explanation the agency proffers in its initial report is that “[a]s indicated in the Agency’s Technical Evaluation Worksheets, and the inspector’s Technical Evaluation Checklist, MITAGS’ facilities met the evaluation criteria from item (j) of the Section M Technical Requirements Checklist. As such, MITAGS was appropriately evaluated as being ‘acceptable’ on item (j).” COS/MOL at 30. Accordingly, we are left with a record that offers no rebuttal to the protester’s assertion that the trailer was not permanent.

In a second filing responding to the supplemental comments submitted by the intervenor, agency counsel represents that “[i]f, during the Agency’s pre-award facility inspection, MITAGS’ restrooms were situated exactly like the one proposed in the Solicitation, then there can be no question MITAGS’ restroom met the stated evaluation criteria from item 1.0(j) of the pre-award checklist.” Resp. to Intervenor’s Supp. Comments at 1 (emphasis added; internal citations omitted). Later in the same filing, agency counsel maintains, without citing to any documents in the record, that MITAGS “provided restroom facilities *exactly* as described in the Q&A”—i.e., a prefabricated restroom trailer “mounted on concrete piers.” *Id.* at 2 (emphasis added). None of the contemporaneous evaluation documents, the contracting officer’s statement, memorandum of law, or the evaluators’ declarations submitted by the agency, however, maintain that MITAGS’s restroom trailer was “mounted on concrete piers” exactly as

⁵ For a variety of reasons, the protester challenges the credibility of MITAGS’s post-protest declaration explaining how its restroom trailer was set up. See Supp. Comments at 2. Because we assess the reasonableness of the agency’s evaluation based on the contemporaneous record and the agency’s post-protest explanations of the contemporaneous record, we do not reach the issue of whether MITAGS’s post-protest explanation of its trailer set up is credible.

⁶ The agency further represents that the “intention behind the ‘permanent structure’ language” for checklist item (j) “was to avoid a situation where the only available restrooms were ‘porta potty’ type facilities.” *Id.* We note that this clarifying explanation was not provided to potential offerors in either the solicitation or the questions and answers, however. Rather, potential offerors were on notice only that restrooms were required to be provided in a “permanent structure,” an undefined term which the response to question 17 indicated could include a trailer “mounted on concrete piers.”

described in question 17. See COS/MOL; AR, Tab 15, Decl. of Safety Specialist at 252-254; Tab 19, Decl. of Deputy Chief of the Contracting Office at 260-261; Tab 20, Decl. of Logistics Manager at 262.

Instead, as noted above, the agency argues in its initial report only that a restroom trailer was not required to be “mounted on concrete piers” to be considered technically acceptable. See COS/MOL at 30. We find the agency’s later-filed arguments unpersuasive because they are not supported by the contemporaneous record or the evaluators’ post-protest explanations of the contemporaneous record, and because they fail to explain how the awardee’s trailer complied with the solicitation’s requirement that the awardee provide a permanent structure for restrooms. See *e.g.*, *Celta Servs., Inc.*, B-411835, B-411835.2, Nov. 2, 2015, 2015 CPD ¶ 362 at 8-9 (finding agency’s post-protest defense unpersuasive because it was not supported by the contemporaneous record).

Here, the agency has failed to provide either a contemporaneous or a credible post-protest explanation of how or why MITAGS’s restroom trailer satisfied the solicitation requirement to provide restrooms in a “permanent structure.” While neither the solicitation, nor the evaluation approach, required the agency to contemporaneously document how it concluded that the awardee’s trailer satisfied the solicitation’s permanent structure requirements, the agency’s protest responses have not reasonably explained how it concluded the trailer was permanent. Put simply, the agency has failed to offer evidence (contemporaneous, or during the protest) to rebut the protester’s assertion that the trailer was not permanent. In this regard, the protester has argued the trailer was not permanent because it only rested on temporary wood supports and was not mounted on concrete piers as specified in the agency’s response to questions.

At best, agency counsel asserts in its response to the Intervenor’s Supplemental Comments that: (1) the evaluators concluded the trailer was acceptable; (2) the trailer was, in fact, mounted on concrete piers; and (3) if the awardee provided its trailer as specified in the Q&A, the trailer was acceptable. These arguments, taken together, do not reasonably explain how the agency concluded that the awardee’s trailer was offered as a permanent structure. While the first assertion was supported by the contemporaneous record--the checklist used by the evaluators does, indeed, include the word “acceptable”--there is no support provided for the second assertion that the trailer was mounted on concrete piers, as the counsel asserts. The third “assertion” is a hypothetical, which does not contribute any meaningful information about the question raised by WRG.

While there may have been no need for the contemporaneous, checklist-type evaluation specified by the solicitation to expressly explain why the trailer was found acceptable, the agency has yet to provide even at this late date--aside from counsel’s assertion--any evidence that the trailer was offered as a permanent structure. Without such evidence,

the agency has failed to refute the protester's assertion that the agency unreasonably assessed the trailer as acceptable.⁷

In further support of its argument that MITAGS's restroom trailer was not a "permanent structure," the protester contends that the trailer is no longer present at MITAGS's facility, having been removed and replaced with "Porta Pottys." 2nd Supp. Protest at 4; exh. 6, Decl. of WRG Vice President at 2-4. In response, MITAGS acknowledges that "after the [agency] conducted its inspection on June 30, 2021, MITAGS had the trailer removed and replaced with porta potties." Intervenor's Supp. Comments at 5. MITAGS explains that it "is conducting upgrades to its facility and construction is taking place in and around where the trailer was previously located." *Id.*, attach. 1, Decl. of MITAGS's Asst. Dir. of Bus. Dev. at 2. MITAGS represents that "[t]o avoid damage to this structure [the restroom trailer] and considering it is not currently in use, it is not present while these activities are taking place." *Id.* MITAGS maintains that while not presently available, "[t]his same restroom trailer, in the same condition as it existed during this pre-award inspection, will be available and used by the [agency] as of the date of commencement of contract performance." *Id.* at 3.

For its part, the agency contends that whether the restroom trailer continued to be present at MITAGS's facility after award is a matter of contract administration not for consideration by our Office. COS/MOL at 30 n.15; Resp. to Intervenor's Supp. Comments at 2. We agree. We note, however, that by MITAGS's own admission, the restroom trailer was moved "following the June 30th, 2021 pre-award inspection," indicating that it may have been moved prior to the agency making award on August 25 and perhaps even prior to the agency's July 29 re-inspection of MITAGS's facility. Intervenor's Supp. Comments, attach. 1, Decl. of MITAGS's Asst. Dir. of Bus. Dev. at 2. We also agree with the protester that the removal of the restroom trailer from MITAGS's facility following the June 30th inspection is an indication that the trailer may not have been a "permanent structure," especially in light of the agency's failure to rebut the protester's assertion.

Accordingly, in light of the above discussion, we find that the record does not support the reasonableness of the agency's evaluation of MITAGS's facility as technically acceptable, and we sustain the protest on this basis. See *e.g.*, *Public Properties, LLC*, *supra* at 6, 7-8 (sustaining protest where contemporaneous record was insufficient for us to conclude that the agency reasonably evaluated the offeror's property as not lying within a 100-year floodplain and agency's post-protest explanation was not consistent with the contemporaneous record); *Hoover Properties, supra* at 9 (sustaining protest where "[b]ased on the lack of documentation and analysis in the record, including the

⁷ Such evidence might have included, for example, a declaration from one of the evaluators refuting the protest allegation. This evidence would have been consistent with the underlying record, and could have explained the finding that the trailer was acceptable. Without such evidence, we are left only with a bald assertion from agency counsel, an approach that, if permitted, would always be sufficient to refute a protester's contention.

agency's post-protest submissions, we were unable to determine that the agency reasonably evaluated" the protester's price).

RECOMMENDATION

We recommend that the agency conduct a new evaluation taking into account the discussion above, adequately document the new evaluation, and make a new source selection decision based on the new evaluation. Prior to conducting the new evaluation, the agency also may want to review technical requirements checklist item (j) to determine whether the solicitation's current language accurately represents the agency's actual needs, or whether the solicitation should be amended. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including reasonably attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel